Supreme Court, U.S.
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80-457

No. .....

In the Supreme Court of the United States

October Term, 1980

LORI WILSON,

Petitioner,

vs.

GEORGE FIRESTONE, Secretary of State of the State of Florida; and DOROTHY W. GLISSON, Deputy Secretary for Elections, Director, Division of Elections of the State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether it is a violation of the United States Constitution for Florida Statutes to require independent candidates for United States Senate to obtain signatures equal to 3% of the electors in order to obtain a position on the ballot, but to require independent candidates for President of the United States to obtain signatures equal to only 1% of the electors.

II. Whether it is a violation of the United States Constitution for Florida Statutes to require independent candidates for United States Senate to obtain and file petition signatures between January 9, 1980, and July 22, 1980 in order to obtain a position on the ballot, but to allow independent candidates for President an unlimited time to collect one-third the number of signatures and permit them to be filed as late as August 15, 1980.

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No. .....

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Respondents.

OPINIONS BELOW

The following opinions of the lower courts, unreported at this time, are included in the Appendix to this Petition:

1. Opinion of the United States Court of Appeals for the Fifth Circuit rendered July 22, 1980, in this action.

2. Opinion of the United States District Court for the Northern District of Florida, rendered June 20, 1980, in this action.

3. Opinion of the United States District Court for the Northern District of Florida, in the case of *Kirk v. Smathers,* Case No. TCA 78-0815, rendered June 8, 1978, and adopted by reference in the District Court's opinion rendered in this action.

JURISDICTION

The opinion and mandate of the Court of Appeals was entered on July 22, 1980. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

Florida Statutes, Section 99.0955

Florida Statutes, Section 103.021

[A verbatim copy of the above statutes are included in the Appendix hereto.]

STATEMENT OF THE CASE

Petitioner Wilson is a former Florida State Senator having been twice elected to that office as an independent candidate. She declared her candidacy for the United States Senate and filed this action alleging that Section 99.0955, Florida Statutes, violated her rights as guaranteed by the Equal Protection and Due Process clauses of the Fourteenth Amendment and by the First and Fifth Amendments to the United States Constitution. Jurisdiction is in the District Court and was invoked pursuant to 42 U.S.C., Section 1983, and 28 U.S.C., Section 1343(3) and (4).

Florida Statutes, Section 99.0955(2), provides that in order to obtain a position on the ballot, an independent candidate for state-wide office other than President and Vice-President must obtain signatures of registered electors equal in number to 3% of the registered electors in the last general election. Consequently, Wilson was required to obtain 126,516 valid signatures in order to appear

on the 1980 ballot. In contrast, independent and minor party candidates for President and Vice-President are required by Florida Statutes, Section 103.021(3), to obtain signatures equal to only 1% of the registered electors in the last general election, or 42,172 signatures.

Independent candidates for state-wide office other than President and Vice-President were required by Florida Statutes, Section 99.0955(1) and (3), to collect and submit signatures between January 9, 1980, and noon on July 22, 1980. Independent and minor party candidates for President and Vice-President, on the other hand, have no beginning date for collection of signatures and may submit them until August 15, 1980, in accordance with Florida Statutes, Section 103.021(3).

The only evidence before the District Court was a deposition of Dorothy W. Glisson, Deputy Secretary of State and Director of the Division of Elections of the State of Florida. She testified that she has served as Director for 27 years, that during that time no problems with an unruly ballot were encountered in the Presidential and Vice-Presidential races despite the 1% requirement, and that she has no reason to believe that more than 1% is necessary in those races. She further testified that she is unaware of any factual basis, stemming from her experience, studies that have been done, or legislative inquiries, on which to conclude that the requirement of more than 1% would make any difference so far as the number of frivolous candidates that would obtain ballot positions in the United States Senate race. Mrs. Glisson also testified that she didn't recall a previous independent candidate who attempted to qualify for United States Senator or Governor by petition under the 3% requirement. However, a candidate did qualify as an independent candidate for President in the 1976 election under the 1% requirement.

ARGUMENT

I. Signature Percentage Requirement

This Court should grant its Writ of Certiorari to review the decision of the Court of Appeals because the Court has decided an important question of Federal law which is in conflict with applicable decisions of this Court. In addition, it is important that this Court establish firm guidelines for States and lower Federal courts in order to eliminate the uncertainty which has resulted in continued unreasonable impediments to ballot access by legitimate[1], independent candidates.

In a series of opinions over the past decade, this Court has recognized that restrictions on access to the ballot burden fundamental constitutional rights, and, consequently, that a state must establish that such restrictions are necessary to serve a compelling interest and are the least drastic means available to serve such interests. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979); *Williams v. Rhodes,* 393 U.S. 23, 21 L.Ed.2d 24, 89 S.Ct. 5 (1968). Nonetheless, despite the fact that well over two-thirds of the states require signatures of 1% or less of the electorate in order to appear on the ballot with no apparent problems having arisen,[2] this Court has approved signature requirements in several states which were well in excess of the 1% level. *Jenness v. Fortson,*

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1. It is noteworthy that the two candidates who have challenged the subject statutes include the Petitioner, a former State Senator twice elected as an independent, and a former Governor of Florida. See *Kirk v. Smathers,* Memorandum Opinion, Case No. TCA 78-0815 (N.D.Fla. 1978) [Appendix A9-A32] Both failed to meet Florida's petition requirements.

2. *Williams v. Rhodes, supra,* at U.S. 34 n. 9; "Nominating Petition Requirements for Third-Party and Independent Candidate Ballot Access," Einhorn, Suffolk University Law Review, XI:974 (1977).

403 U.S. 431, 29 L.Ed.2d 554, 91 S.Ct. 1970 (1971); *Jackson v. Ogilvie,* 325 F.Supp. 864 (N.D.Ill.), summarily aff'd 403 U.S. 925, 29 L.Ed.2d 705, 91 S.Ct. 2247 (1971); *Beller v. Kirk,* 328 F.Supp. 485 (S.D.Fla. 1970), summarily aff'd *Beller v. Askew,* 403 U.S. 925, 29 L.Ed.2d 705, 91 S.Ct. 2248 (1971). As a result, states such as Florida have been encouraged to maintain artificially high barriers to ballot access. Florida currently has the highest numerical requirement in the country.[3]

While this Court, since *Williams v. Rhodes, supra,* has been unwilling to compare access requirements among the several states in judging the reasonableness of a particular state's statute, it forcefully drew the line when it came to conflicting regulations for independent candidates in the same state when it decided *Illinois State Board of Elections v. Socialist Workers Party, supra,* last year. In *Illinois,* the statute required that candidates for offices less than state-wide obtain signatures equal 5% of the electors in the last election. The result was that independent candidates for Mayor of Chicago were required to obtain 35,947 ballot signatures. In contrast, independent candidates for state-wide office were only required to obtain a flat 25,000. In holding that any requirement in excess of 25,000 signatures for independent candidates in Illinois was unconstitutional, this Court stated:

> The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means

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3. *Suffolk University Law Review, supra,* Tables 1 and 2. (Since the article was printed in 1977, North Carolina, which was then the highest, has reduced its requirements below Florida's.)

> of protecting the State's objectives. The Illinois Legislature has determined that its interest in avoiding overloaded ballots in state-wide elections is served by the 25,000 signature requirement. Yet, Appellant has advanced no reason, much less a compelling one, why the State needs a more stringent one for Chicago.

Illinois State Board of Elections, supra, at U.S. 186.

Instead of independent candidates for state-wide office on the one hand and city office on the other, the case at bar involves two independent candidates for state-wide office. However, the case at bar is not materially distinguishable from *Illinois State Board, supra.* Independent candidates for United States Senate in Florida appeal to the same pool of voters as independent candidates for President and both are required to obtain a majority of that pool of voters. The Florida Legislature has determined that acquisition of signatures equal to 1% of the electorate shows a sufficiently significant modicum of support to warrant ballot access and that a 1% requirement is a sufficient restriction to insure ballot integrity. The Director of the Division of Elections of the State of Florida for 27 years testified that the State has had no problems with an unruly ballot under the 1% requirement. As in the *Illinois State Board* case, the State of Florida advanced no reason at the hearing, much less a compelling one, why the State needs a more stringent requirement for independent candidates in the United States Senate race than in the Presidential race. To the contrary, the Director testified that she was unaware of any factual basis upon which to suggest that the requirement for obtaining 3% rather than 1% makes any difference so far as the number of frivolous candidates who would obtain ballot positions.

The Court of Appeals concluded that, "There is a logical reason for Florida's requiring fewer signatures on the petition of an independent candidate for President of the United States than for an independent candidate for a state-wide office." (App. A1) However, the Court did not specify what the logical reason was and it must be presumed that the Court accepted the reason advanced by the District Court. The District Court concluded that, "* * * Plaintiff Wilson is not similarly situated as are independent candidates for the Presidency and Vice-Presidency of the entire country." (App. A7) The District Court also failed to specify its reasons, instead adopting by reference its earlier memorandum opinion in the 1978 case of *Kirk v. Smathers, supra.* In that case, the District Court stated:

> Florida has chosen to afford independent and minor party candidates for President and Vice-President (the only nation-wide elective offices) a less onerous pathway to ballot position. This is not an arbitrary choice. As suggested by the testimony of Elections Director Singleton the differing qualifications reflect a realization by the State of Florida of the unique problems imposed by candidacy for nation-wide office. Candidates for the Presidency and Vice-Presidency must campaign in many, if not all, of the States of the Union. It appears to have been the judgment of the Florida Legislature that the burden on such candidates in trying to become placed on the ballot in this and other states may be insurmountable if they are required to expend the time, resources and campaign funds in this single state necessary to obtain the signatures of three percent of the voters. Independent candidates for all other offices are free of the difficulties attendant upon the far-flung pres-

idential campaigns, and may concentrate their efforts in order to satisfy the three percent requirement.[4]

Kirk v. Smathers, Case No. TCA 78-0815 (N.D.Fla. 1978). Ibid. at 8, 9.

This Court's opinion in the *Illinois State Board* case leads to the inescapable conclusion that it is not sufficient for the State to suggest that a lesser requirement may be established for Presidential and Vice-Presidential candidates because of a desire to afford them "* * * a less onerous pathway to ballot position * * * because of the greater demands upon their time and resources." That same argument would have applied in the *Illinois State Board* case and was implicitly rejected by this Court. Obviously, there is a much greater demand upon the time and resources of a candidate running state-wide than upon a candidate running in a single city.

The fact is the courts below made no finding of necessity whatsoever, much less a compelling necessity. If the "compelling necessity" standard is to have any meaning, it must require more of a state than the desire to provide a more convenient route of access for one candidate than another.[5]

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4. No evidence of legislative intent appears in the record of the case, nor does any appear in the legislation itself. The speculation of the Elections Director was generous. Equally, if not more, plausible is the possibility of political motivations. In Florida, as all other states, access restrictions imposed on independent and minor party candidates are created by major party incumbents who have a direct interest in raising barriers to potential opposition. Candidates for President and Vice-President, of course, pose no such threat to state legislators.

5. In a mirror reversal of Florida's provision, Alaska, Colorado and Rhode Island each have substantially more stringent requirements for ballot access by Presidential and Vice-Presidential candidates than for other state-wide candidates. A Federal Court, faced with a challenge to those statutes, could undoubtedly perceive a legislative rationale equally as plausible, and equally noncompelling, as that suggested by the court below.

II. Signature Filing Deadline

A number of Federal District Courts in the past several years have declared unconstitutional state statutes having "early" deadlines for the filing of petition signatures by independent and minor party candidates. See *Bradley v. Mandell*, 449 F.Supp. 983 (D.Md. 1978); *McCarthy v. Noel*, 420 F.Supp. 799 (D.R.I. 1976); *McCarthy v. Kirkpatrick*, 420 F.Supp. 366 (W.D.Mo. 1976). Florida's early filing date for independent candidates suffers from the same defect[6], but includes an additional factor as well which renders it unconstitutional pursuant to this Court's decision in *Illinois State Board of Elections v. Socialist Workers Party, supra*. This Court's decision in the *Illinois* case did not deal directly with the filing deadline question as it is presented by the case at bar. Nonetheless, the holding in the *Illinois* case applies with equal force to Florida's filing deadline.

Florida Statutes, Section 99.0955(1) and (3), require independent candidates for state-wide office other than President and Vice-President to submit petition signatures on forms obtained from the qualifying officer after the first Tuesday following the first Monday in January, this year January 9th. The signatures must be submitted by noon on the 49th day prior to the first primary election, this year July 22nd. In contrast, independent and minor party candidates for President and Vice-President, which need only submit one-third the number of signatures, have no starting date and have until August 15th in which to file signatures. This Court's reasoning in the *Illinois* case requires that the state make a showing, under strict judicial scrutiny, of a compelling necessity for placing substantially more stringent requirements upon indepen-

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6. Compare Florida's filing date which is 49 days before the first primary and over three months before the general election to the filing date in *McCarthy v. Noel, supra*, which was one month before the state primary.

dent candidates in one state-wide race than independent candidates in another. In the case at bar, the state made absolutely no effort even to suggest a necessity for the distinction, and neither the District Court nor the Court of Appeals even addressed the issue in their opinions. It seems apparent that the two provisions, which were adopted by the Florida Legislature at different times, were enacted without consideration of the inequity created. The result is no less incongruous than the statutory inequity invalidated by this Court in *Illinois State Board of Elections*. In Florida, an independent candidate appealing to a state-wide voter pool is given a limited time and 24 fewer days to collect three times as many signatures as an independent candidate appealing to the same pool of voters in another race who has no time limit for collecting one-third the signatures. If such a statutory inequity were permitted to exist in the face of a complete failure by the state to even attempt a rationalization and the complete failure by the lower courts to even address the issue, this Court's repeated declarations regarding the burden upon the state to show "compelling necessity" and upon the courts to engage in "close scrutiny" would have no meaning.

For the foregoing reasons, Petitioner respectfully urges this Court to grant certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Lori WILSON, Plaintiff-Appellant,

v.

George FIRESTONE, Secretary of the State of Florida and Dorothy W. Glisson, Deputy Secretary for Elections, Director, Division of Elections of the State of Florida, Defendants-Appellees.

No. 80-5487

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit,
Unit B.

July 22, 1980.

On appeal from judgment entered by the United States District Court for the Northern District of Florida, William Stafford, J., the Court of Appeals held that Florida's requiring fewer signatures on petition of independent candidate for President of the United States than for independent candidate for statewide office did not constitute discrimination nor denial of equal protection.

Affirmed.

Constitutional Law (Key) 225.2(2)

Florida's requiring fewer signatures on petition of independent candidate for President of the United States than for independent candidate for statewide office did not constitute discrimination or denial of equal protection. U.S.C.A. Const. Amend. 14.

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*Fed.R.App.P. 34(a); 5th Cir. R. 18.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Our eview of this matter indicates that a trial was held on the merits and judgment rendered following a bench trial, and not following a summary judgment. Appellant does not contend that the case should be reversed because the issues of fact might have been inappropriately disposed of on summary judgment.

We affirm the trial court's judgment. There is a logical reason for Florida's requiring fewer signatures on the petition of an independent candidate for President of the United States than for an independent candidate for a statewide office. Plaintiff is not being discriminated against nor denied equal protection by this difference in classification.

The Florida statute in question has been approved summarily by the Supreme Court in *Beller v. Askew,* 403 U.S. 925, 91 S.Ct. 2248, 29 L.Ed.2d 705 (1971). More stringent requirements for access to the ballot have been approved by the Supreme Court in *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), does not control this case. The opinion in that case illustrates an anomaly that existed. A candidate for a statewide office in Illinois could have access to the ballot by obtaining 25,000 names in Chicago (or anywhere in the state), but could not have access to the ballot in a city-wide race in Chicago unless he obtained 35,947 names.

The concurring opinion of Mr. Justice Rehnquist points out how the fractured Illinois Election Law resulted in this incongruous result. There is no similarity between the Illinois Election Law, as circumscribed by two appellate court decisions, and the Florida Election Law which has been approved by the Supreme Court.

Finding no error, we AFFIRM.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 80-880

LORI WILSON,
Plaintiff,

v.

GEORGE FIRESTONE; Secretary of State of the State of Florida; and DOROTHY W. GLISSON, Deputy Secretary for Elections, Director, Division of Elections of the State of Florida,
Defendants.

ORDER

(Filed June 20, 1980)

This action is brought pursuant to 42 U.S.C. §1983 to redress the deprivation under color of state law of a right and privilege secured by the Constitution of the United States. Plaintiff challenges Section 99.0955(1), (2) and (3)(a), Florida Statutes, which establishes petition procedures by which independent candidates for federal, state, county, and district offices in Florida may obtain a position on the general election ballot, as unnecessarily and arbitrarily burdening an independent's access to the ballot in derogation of the First, Fifth, and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 USC §1343 and plaintiff seeks the entry of declaratory and injunctive relief under 28 USC §§2201 and 2202. The court has jurisdiction over the parties and over the subject matter.

There is present in this case no genuine issue as to any material fact and disposition by summary judgment is appropriate. Fed.R.Civ.P. 56.

Findings of Fact

1. Plaintiff, Lori Wilson, is a declared, independent candidate for the United States Senate in the November, 1980, general election and meets all the requirements for the office as set out in Article I, Section 3, of the Constitution of the United States.

2. Defendant George Firestone, Secretary of State of Florida, is the state's chief elections officer as prescribed by Article IV, §4(b), Constitution of the State of Florida, and Section 97.012, Florida Statutes.

3. Defendant Dorothy W. Glisson, Deputy Secretary for Elections, Department of State, is Director of the division charged with administering and enforcing the state election laws (Division of Elections).

4. Plaintiff has declared her intention to become an independent candidate for the United States Senate in the 1980 general election and has been actively seeking signatures of registered electors on petition cards provided by the Director of the Division of Elections.

5. Section 99.0955(2), Florida Statutes, requires that an independent candidate for office elected on a state-wide basis, including candidates such as plaintiff seeking election to the United States Senate, must obtain the signatures of 3% of the registered electors of Florida as shown by the compilation by the Department of State for the last preceding general election in order to obtain a position on the ballot.

6. Section 103.021(3), Florida Statutes, requires independent and minor party candidates for President and

Vice-President of the United States to obtain the signatures of only 1% of the registered voters in the last general election in order to obtain a position on the ballot.

7. There were 4,217,817 registered electors in the State of Florida as shown by the compilation of the Department of State for the last preceding general election. Consequently, plaintiff as an independent candidate for the United States Senate must obtain 126,534 signatures in order to be placed on the ballot while an independent or minor party candidate for President or Vice-President of the United States is only required to obtain 42,172 signatures.

8. Section 99.0955(1) and (3)(a), Florida Statutes, prohibits an independent candidate for state-wide office, including United States Senator, such as plaintiff, from collecting signatures prior to the first Tuesday following the first Monday in January preceding the general election and requires such candidate to submit petitions prior to noon of the 49th day preceding the first primary election. Consequently, plaintiff was prohibited from collecting signatures prior to January 9, 1980, and must submit her signatures no later than noon on July 22, 1980.

9. Section 103.021(3), Florida Statutes, provides that independent and minor party candidates for the offices of President and Vice-President of the United States may submit petitions until August 15th on the year of the election and Florida law provides no date for candidates for such offices to begin obtaining signatures.

10. Independent candidates for the United States Senate have only 195 1/2 days in which to obtain 125,534 petition signatures while independent and minor party Presidential and Vice-Presidential candidates are required to gather only one third that number, may begin to collect the signatures at any time and may continue

collecting signatures for 24 days after the deadline for submission of signatures by United States Senate candidates.

Conclusions of Law

The plaintiff recognizes that this court addressed the same issues here raised in *Kirk v. Smathers,* TCA 78-0815 (N.D. Fla. June 8, 1978), denying the relief sought therein by plaintiffs, but argues that the decision of the United States Supreme Court in *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L. Ed.2d 230 (1979) requires a different conclusion in 1980.

In the *Illinois* case, the Court struck down the state's requirement that independent or new party candidates for local office obtain the signatures of five percent of the number of persons who voted at the previous election for the local office in order to be placed on the ballot, in view of the state's requirement of only 25,000 signatures of qualified voters to gain ballot access in statewide elections. In the context of the Chicago mayoral election, from which the challenge arose, the statutory requirement of 5% necessitated the filing of 63,373 valid signatures, an incongruous burden in comparison to the state's acknowledgement that 25,000 signatures indicated state-wide support.

The issue framed herein arises from a different factual context; the Supreme Court's *Illinois* opinion gives no indication of expansiveness which would include Florida's recognition of the dissimilarities between campaign problems faced by national, as opposed to state-wide or local candidates. Here, Plaintiff Wilson is not similarly situated as are independent candidates for the Presidency and Vice Presidency of this entire country. The requirement of gathering petition signatures of 3 percent of

the voters applies equally to other candidates seeking the same office as Plaintiff Wilson. It does not offend Fourteenth Amendment guarantees for Florida to take into account the differences in seeking state-wide, as opposed to nation-wide, office when fashioning the provisions which govern placement of independent candidates' names on the ballot.

The court adopts the reasoning of its order in *Kirk v. Smathers,* specifically that of pages four through nine.

In accordance with the above, it is ORDERED AND ADJUDGED:

1. That plaintiff's motion for summary judgment should be, and hereby is, DENIED.

2. That defendants' motion for summary judgment should be, and hereby is, GRANTED.

3. This case having proceeded to a final hearing, and plaintiff having failed to demonstrate the invalidity of Section 99.0955, Florida Statutes, this action is dismissed on the merits, and the clerk of the court is directed to prepare and enter judgment in favor of defendants Firestone and Glisson and against plaintiff Wilson.

DONE AND ORDERED this 20th day of June, 1980.

/s/ William Stafford
William Stafford
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 78-0815

CLAUDE R. KIRK, JR., F. J. ROBERTO, JR., and
STEPHEN R. MACNAMARA,
Plaintiffs,

vs.

BRUCE A. SMATHERS and MARY SINGLETON,
Defendants.

MEMORANDUM OPINION AND ORDER

(Filed June 8, 1978)

This is an action brought pursuant to 42 U.S.C. §1983 to redress asserted deprivations, under color of state law, of rights and privileges secured by the Constitution of the United States. The plaintiffs challenge Florida Statutes §99.0955,[1] which establishes petition procedures by

1. Insofar as is relevant to this case, Florida Statutes §99.0955 provides:

(1) Any registered elector seeking to have his name placed on the ballot at the general election as an independent candiate for an office may have his name printed on the general election ballot in which election such office is to be filled, provided he is otherwise qualified to hold the office that he seeks and provided a petition requesting that he be assigned a position on the general election ballot is signed by the required number of registered electors. Such person shall obtain the signatures on a petition form prescribed by the Department of State and furnished by the appropriate qualifying officer. Such forms may be obtained from the qualifying officer at any time after the first Tuesday following the first Monday in January preceding the general election, but prior to the 92nd day prior to the date of the first primary election.

(Continued on following page)

which independent candidates for federal, state, county, and district offices in Florida may obtain a position on

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Footnote continued—

(2) A candidate for an office elected on a statewide basis shall obtain the signature of a number of the qualified electors equal to 3 percent of the registered electors of Florida, as shown by the compilation by the Department of State for the last preceding general election. When joint candidacies for the offices of Governor and Lieutenant Governor are provided by law, independent candidates for the offices of Governor and Lieutenant Governor shall form a joint candidacy, and only one petition shall be used to place both names on the ballot as otherwise provided in this section. A candidate for any federal, state, county, or district office to be elected on less than a statewide basis shall obtain the signatures of a number of the qualified electors of the district, county, or other geographical entity equal to at least 3 percent of the total number of the registered voters of the district, county, or other geographical entity represented by the office sought, as shown by the compilation by the Department of State for the last preceding general election.

(3)(a) Each candidate for a federal, state, or multicounty district office shall submit a separate petition for each county from which signatures are sought. Each petition shall be submitted, prior to noon of the 92nd day preceding the first primary election, to the supervisor of elections of the county for which such petition was circulated. Each supervisor to whom a petition is submitted shall check the names and shall, upon payment of the cost of checking the petitions or filing of the oath as prescribed in s. 99.097, certify to the Department of State, prior to the first day of qualifying, the number shown as registered electors of said county. The Department of State shall determine whether or not the required number of signatures has been obtained and shall notify the candidate. If the required number of signatures has been obtained, the candidate shall, during the time prescribed for qualifying for office, submit a copy of such notice, and files his qualifying papers with, the Department of State, pay his filing fee, and take and subscribe to the oath provided in s. 99.021. However, any candidate who is unable to pay such fee without imposing an undue burden on his personal resources, or upon resources otherwise available to him shall, upon written certification of such inability given under oath to the Department of State, be exempt from paying the filing fees. The name of each candidate who qualifies pursuant to this paragraph to have his name printed on the general election ballot shall be certified to the supervisor of elections of each county affected by such candidacy by the Department of State at the time the names of other candidates to be printed on the general election ballot are certified to each supervisor.

the general election ballot, as unnecessarily and arbitrarily burdening an independent's access to the ballot in derogation of the First, Fifth, and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §1343, and plaintiffs seek the entry of declaratory and injunctive relief under 28 U.S.C. §§2201 and 2202. The court has jurisdiction over the parties and the subject matter.

Plaintiff Claude R. Kirk is a former governor of the State of Florida and a declared independent candidate for election as governor in the upcoming November 7, 1978, general election. Plaintiffs F. J. Roberto, Jr., and Stephen R. MacNamara are Florida electors registered, respectively, as an Independent and as a Democrat, who support Kirk's candidacy and who have signed petitions that Kirk's name be placed on the ballot as an independent candidate for governor.

Defendant Bruce A. Smathers holds the position of Secretary of State of the State of Florida and as such is the State's chief elections officer. Defendant Mary Singleton is the Director of the Division of Elections of the Florida Department of State. The Division of Elections is charged with administering and enforcing the state election laws.

This action was filed on May 9, 1978. Plaintiffs thereafter moved for a mandatory preliminary injunction, which motion came on for an evidentiary hearing on May 23, 1978. At the hearing both plaintiffs and defendants, in the interest of expediting this case, stipulated to the hearing being treated as a final hearing on the merits. Counsel agreed that, following the submission of additional briefs, the court could enter a final order without hearing any further evidence or argument. The Republican Party of Florida has subsequently filed a motion

to intervene as a party defendant, a proposed answer to the complaint, a memorandum in opposition to the motion for preliminary injunction, and a request for oral argument.

Preliminarily, the court must dispose of the motion to intervene. Intervenor's motion asserts that, as one of the two major political parties in Florida, the Republican Party has "a direct and substantial interest in supporting the validity of . . . Section 99.0955, Florida Statutes," entitling it to intervention of right under Rule 24(a), F.R.Civ.P. Alternatively, intervenor asserts that, even if the court should determine that it may not intervene as a matter of right, its interests in the present litigation are sufficient to satisfy the applicable tests for permissive intervention under Rule 24(b)(2). The court concludes that the Republican Party of Florida should unquestionably be allowed permissive intervention in this action in accordance with Rule 24(b)(2); it is thus unnecessary to address the contentions relative to intervention of right.

Rule 24(b)(2), F.R.Civ.P., states, "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Allowance of permissive intervention rests within the sound discretion of the district court. *McDonald v. E. J. Lavino Co.*, 430 F. 2d 1065 (5th Cir. 1970). It is not to be granted grudgingly, but should be allowed whenever the broad prerequisites of Rule 24(b)(2) are met.

> The "claim or defense" portion of the rule has been construed liberally, and indeed the Supreme Court has said that it "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." SEC v. United States Realty & Improvement Co.,

supra, 310 U.S. at 459, 60 S. Ct. at 1055, 84 L. Ed. at 1293. See also Textile Workers Union of America, CIO v. Allendale Co., 96 U.S. App. D.C. 401, 226 F. 2d 765 (D.C. Cir. 1955); United States v. Local 638, Enterprise Assn., Etc., 347 F. Supp. 164 (S.D.N.Y. 1972). Two distinguished commentators have observed that "it appears that the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit. . ." Wright & Miller, supra, §1911. See also Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 732-36 (1968).

In Re Estelle, 516 F. 2d 480, 485 (5th Cir. 1975).

It cannot fairly be gainsaid that the Republican Party of Florida has a considerable interest in the outcome of litigation testing the validity of the election laws which regulate the affairs of the Party and its political opponents. Moreover, intervenor's proposed answer and its memorandum in opposition to the motion for preliminary injunction reveal that intervenor proposes to interject claims and defenses substantially identical to those of defendants. This is all that Rule 24(b)(2) requires.

Additionally, the court finds that permitting intervention at this time will neither delay these proceedings nor unduly prejudice any existing party. Plaintiffs' objection that the motion to intervene is untimely is unpersuasive, given the short period of time that has elapsed since the complaint was filed and the rapidity with which this action reached a final hearing. The motion was filed a mere 27 days after the complaint; greater promptness on the part of any party could hardly be required or expected. For the reasons stated above, the motion to intervene shall be granted.

As far as the merits of this action are concerned, the applicable constitutional principles are not difficult to discern. Laws restricting the exercise of the franchise or the ability of candidates or parties to obtain a position on the ballot impact upon

> two different, although overlapping, kinds of rights - the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly, we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Election statutes may offend the Equal Protection Clause of the Fourteenth Amendment if they are so burdensome on the right to vote effectively and the right to associate for political purposes that independent candidates and parties other than the two major parties find it extremely difficult or impossible to achieve ballot position. *Williams v. Rhodes, supra; Storer v. Brown,* 415 U.S. 724 (1974). A state may not "confer an effective political monopoly on the two major parties." *Storer v. Brown, supra,* at 729.

Because the preservation of voting and associational rights is deemed fundamental to our system of constitu-

tional government, statutory burdens on these rights are upheld only when "they are necessary to further compelling state interests." *American Party of Texas v. White,* 415 U.S. 767, 780 (1974). *See also Storer v. Brown, supra,* at 729; *Williams v. Rhodes, supra,* at 32.

On the other hand, a state is not unpossessed of a number of valid and subordinating public interests in the context of electoral regulation. One of the most significant of these is the state's proper concern for limiting the ballot to a manageable size. As noted in *Bullock v. Carter,* 405 U.S. 134, 145 (1972):

> a State has a legitimate interest in regulating the number of candidates on the ballot. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.

It is also a proper legislative aim for a state to seek "to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Jenness v. Fortson,* 403 U.S. 431, 442 (1971).

Where the requirements for placing an independent candidate's name on the ballot are specifically concerned, as in the present case, "the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support." *Storer v. Brown, supra,* at 746.

There is no "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." *Storer v. Brown,* at 730. The task of the court in a case of this sort is

to carefully scrutinize the means selected by the state in pursuit of its valid objectives and to balance them against any attendant encroachment upon voting and associational rights. *Ashworth v. Fortson,* 424 F. Supp. 1178 (N. D. Ga. 1976).

> Decision in this context, as in others, is very much a "matter of degree," Dunn v. Blumstein, supra, at 348, 31 L Ed 2d 274, very much a matter of "consider-[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, supra, at 30, 21 L Ed 2d 24; Dunn v. Blumstein, supra, at 335, 31 L Ed 2d 274.

Storer v. Brown, supra, at 730. The focal point of inquiry, as pinpointed by the Supreme Court, is: "in the context of [Florida] politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Storer v. Brown, supra,* at 742; *Mandel v. Bradley,* ..... U.S. ....., 53 L. Ed. 2d 199, 205 (1977).

Plaintiffs attack the constitutionality of each of five separate requirements of Florida Statutes §99.0955. In addition, plaintiffs object to the fact that the petition process mandated by the statute constitutes the sole vehicle by which an independent, even one enjoying great name recognition or public support, may gain a ballot position.

The first item in the statute found objectionable by the plaintiffs is the requirement that an independent candidate "obtain the signatures of a number of the qualified electors equal to 3 percent of the registered voters of Florida, as shown by the compilation by the Department

of State for the last preceding general election." Florida Statutes §99.0955(2).[2] As plaintiffs note, this procedure is substantially more burdensome than that required of independent or minor party candidates for President and Vice President, who need only obtain petitions bearing the signatures of 1 percent of registered Florida electors. Florida Statutes §103.021(3). Thus, plaintiff Kirk is compelled to gather 122,829 petition signatures (3% of the registered voters at the time of the last general election), while an independent or minor party Presidential candidate would only have to gather 40,943. Plaintiffs contend this disparity constitutes invidious discrimination repugnant to the Equal Protection Clause.

Standing alone, without comparison to the provisions of §103.021(3), the 3 percent requirement of §99.0955 would have to be regarded as valid. This requirement

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2. Florida Statutes §103.021(3) reads:

(3) A minor political party may have the names of its candidates for President and Vice President printed, and independent candidates for President and Vice President may have their names printed, on the general election ballots if a petition is signed by one percent of the registered electors of Florida, as shown by the compilation by the Department of State for the last preceding general election. A separate petition shall be submitted from each county for which signatures are solicited. Said petition shall be submitted to the supervisor of elections of the respective county no later than August 15 of each presidential election year. The supervisor shall check the names and shall, on or before the date of the first primary, certify the number shown as registered electors of said county, and said supervisor shall be paid by the person requesting the certification the cost of checking the petitions prescribed in s. 99-097. The supervisor shall then forward the certificate to the Department of State which shall determine whether or not the percentage factor as required in this section has been met. When the percentage factor as required in this section has been met, the Department of State shall order the names of the candidates for whom the petition was circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

is well within the percentage parameters previously held acceptable by the Supreme Court. See *Jenness v. Fortson, supra* (5%); *Storer v. Brown, supra* (5%). It is identical, in fact, to the 3 percent provision applicable to minor party candidates contained in Florida Statutes §99.096, which was upheld in *Beller v. Kirk,* 328 F. Supp. 485 (S.D. Fla. 1970), *aff'd sub. nom. Beller v. Askew,* 403 U.S. 925 (1971). In addition, the petition method as employed in Florida has been shown by past experience to hold out something more than an illusory promise of ballot access; defendants' exhibits show that third-party candidates reached the general election ballot in both 1974 and 1976 as a result of successful petition drives. As the Supreme Court has pointed out, the lesson of "[p]ast experience [is] a helpful, if not always an unerring, guide." *Storer v. Brown, supra,* at 742.

Plaintiffs' assertion that it is invidious discrimination to place conditions upon independent candidates for the Presidency and Vice-Presidency which are different from, and unequal to, those imposed upon independent candidates for all other elective offices is fatally flawed. The argument suffers because it attempts to equate the situations of candidates for all elective offices and assumes that the same considerations must apply to all despite obvious differences in the burden each must face in attempting to gain election. It is a familiar concept that the Equal Protection Clause is implicated only where "persons standing in the same relation to the governmental action questioned or challenged" are not treated uniformly. *Reynolds v. Sims,* 377 U.S. 533, 565 (1964).

Florida has chosen to afford to independent and minor party candidates for President and Vice-President (the only nation-wide elective offices) a less onerous pathway to ballot position. This is not an arbitrary choice. As

suggested by the testimony of Elections Director Singleton, the differing qualifications reflect a realization by the State of Florida of the unique problems posed by candidacy for nation-wide office. Candidates for the Presidency and Vice-Presidency must campaign in many, if not all, of the states of the Union. It appears to have been the judgment of the Florida Legislature that the burden on such candidates in trying to become placed on the ballot in this and other states may be insurmountable if they are required to expend the time, resources, and campaign funds in this single state necessary to obtain the signatures of 3% of the voters. Independent candidates for all other offices are free of the difficulties attendant upon far-flung presidential campaigns, and may concentrate their efforts in order to satisfy the 3% requirement.[3]

Mr. Justice Stewart's comments for the Supreme Court in *Jenness v. Fortson,* 403 U.S. 431, 441-42 (1971), are particularly appropriate in the present context:

> The fact is that there are obvious differences in kind between the needs and potentials of a political

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3. It might be argued that if a 1% petition requirement is sufficient to satisfy the State's interest in assuring support in the community with regard to an independent or minor party candidate for President, it should also be sufficient with regard to a candidate for Governor. This does not necessarily follow. A presidential candidate who is popular in another region of the country may as yet be a stranger to many Florida voters. Such a person may be deserving of a position on the ballot and an opportunity to translate his regional popularity into national success at the polls with only a showing of support by 1% of registered Florida voters. Contrastingly, a candidate for statewide office should be able to demonstrate that his support within the State of Florida is of a greater magnitude than many presidential candidates from out-of-state would be able to muster. Plaintiffs' "burden was to demonstrate in the first instance a discrimination against them of some substance. 'Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Constitution.'" *American Party of Texas v. White,* 415 U.S. at 781, *quoting Ferguson v. Skrupa,* 372 U. S. 726 (1963).

> party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes, supra.

The case at bar does not involve an instance where the State of Florida has imposed different requirements upon persons who are similarly situated. The requirement of gathering petition signatures of 3 percent of the voters applies equally to other candidates seeking the same office as plaintiff Kirk, including major party candidates who cannot pay the filing fee, Florida Statutes §99.095, and minor party candidates, Florida Statutes §99.096. There are significant dissimilarities between the campaign problems faced by national, as opposed to state-wide or local candidates. It does not offend Fourteenth Amendment guarantees for Florida to take these differences into account when fashioning rules to govern the placing of independent candidates' names on the ballot.[4]

Plaintiffs' second challenge is to the provision in §99.0955(1) that all petition signatures be obtained on a form prescribed by the Department of State. The presently required petition form, which is found in the record as plaintiffs' exhibit #1, is a card on which the voter is to place the name of the person whose candidacy he supports, the position for which the candidate seeks to run,

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4. What has been said in rejecting plaintiffs' claims with regard to the disparity in petition percentage requirements between Presidential and Vice-Presidential and all other candidates applies with equal force to other differences between the provisions of §99.0955 and §103.021(3).

and the voter's own signature, address, and precinct number. Since no space is provided for multiple signatures, each petition card must be signed by a single voter. The Department of State furnishes petition cards to political aspirants or their campaign committees at no charge. Candidates are permitted to obtain additional cards at their own expense from a commercial printer, but all cards so procured must match those provided by the Department, even as to the color of ink used. The Department does not currently allow candidates to utilize petition forms printed in newspapers.

Plaintiffs contend that there is no justifiable, let alone compelling, basis for the requirement that all petitions be on individual cards conforming to the requirements set by the Department of State, and that this limitation substantially hinders their efforts to obtain petition signatures. The court cannot agree with these contentions.

It is not to be doubted that the State of Florida has an interest in insuring the quick and accurate verification of petition signatures. Correct verification serves both the needs of the State, which must assure itself that an independent candidate in fact has the requisite support in the community, and those of the candidate himself, whose entitlement to a position on the ballot depends upon the accurate verification of the necessary number of petitions. The limitation on the kind of petition forms that may be utilized serves the important interests involved without unnecessarily restricting plaintiffs' basic rights.

Testimony presented by defendants' witnesses revealed that prior to January 1, 1978, there was no uniform practice followed in regard to petition forms. Each candidate was at liberty to use any form he desired. Typically, the petitions consisted of long paper forms containing as many as 10 signatures per page. These long forms pro-

vided no way to divide the petitions by counties or districts or to place them in alphabetical order.

The successful popular initiative campaign in 1975-76 to adopt the so-called "Sunshine Amendment" (now Article II, §8 of the Florida Constitution) utilized cards containing individual voter signatures. State elections officials discovered that the use of individual signature cards permitted easy division of petitions by counties and alphabetizing of the signatures. This, in turn, resulted in simplifying the verification process and shortening the amount of time required for verification. Additionally, the accuracy of the process was enhanced.

At the hearing, it was further explained by defendants' witnesses that the use of cards printed with a prescribed color of ink, which is not made known prior to the first day on which the cards may be obtained, furthers the salutary purpose of preventing cards from being fraudulently printed, distributed and signed prior to the petition period.

Plaintiffs lay great stress upon their inability to use newspaper coupons as petition forms. Here, as with their other allegations directed at the petition form requirements, plaintiffs have failed to demonstrate the existence of a severe burden on their potential for gaining petition signatures outweighing the valid interests of the state. Testimony established that petitions signed on newsprint are more likely to be unverifiable than those signed on cards. Moreover, a candidate is restricted in no other way in his use of the newspapers to advance his petition drive. He is free, for example, to advertise in the media. Additionally, he may provide the cards furnished to him by the State (or purchased from another source) to be inserted in the newspapers for distribution to their readers. Plaintiff MacNamara testified that the Kirk campaign has

in fact considered and explored the possibility of pursuing this means of distributing petitions.

Plaintiffs further argue the invalidity of §99.0955 on the basis that it establishes an unreasonably short period of time for obtaining petition signatures. The statute prohibits an independent candidate from beginning to obtain petition signatures until the first Tuesday following the first Monday in January preceding the general election (in this year January 3, 1978), and requires that all petitions be submitted prior to noon of the ninety-second day preceding the first primary election (in this year June 12, 1978). In the current year, this amounts to a total petition-gathering time of 160 days.

Review of the relevant precedent in this area reveals the lack of substance in plaintiffs' claim of insufficient time for obtaining signatures. In *American Party of Texas v. White, supra,* the Supreme Court stated:

> Neither do we consider that the 55 days is an unduly short time for circulating supplemental petitions. Given that time span, signatures would have to be obtained only at the rate of 400 per day to secure the entire 22,000, or four signatures per day for each 100 canvassers - only two each per day if half the 22,000 were obtained at the precinct conventions on primary day. A petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required States to do the impossible. . . . Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other, and we are thus unimpressed with arguments that burdens like those

> imposed by Texas are too onerous, especially where two of the original party plaintiffs themselves satisfied these requirements.

Id. at 786-87.[5] *Jenness v. Fortson, supra,* upheld a Georgia elections statute requiring that petitions signed by at least 5% of the registered voters at the last general election for the office in question be obtained over a six-month period. These requirements compare favorably to those in the statute challenged here. Finally, in *Storer v. Brown, supra,* it was held that "gathering 325,000 signatures in 24 days" was not a facially invalid requirement. *Id.* at 740.

Plaintiffs' difficulties on their third claim are not solely the consequence of adverse precedent, however. Plaintiffs are required to make an evidentiary showing, and not just conclusory allegations, that the statute places hardship on them in their efforts to attain ballot status. This they have plainly failed to do. Not one item of proof was introduced to show that plaintiffs made serious efforts to obtain petition signatures, but were stymied by the time restrictions contained in the statute. Plaintiffs have demonstrated "absolutely no factual basis in support of their claims." *American Party of Texas v. White, supra,* at 790.[6]

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5. As was noted previously, minor party candidates have successfully reached the ballot in Florida on two occasions by way of a procedure identical to that in §99.0955. As stated in *American Party of Texas v. White,* this goes a long way toward indicating that the burdens imposed on plaintiffs by the statute are not "onerous."

6. Defendants and intervenor have raised the issues of laches, estoppel and waiver by way of affirming defenses to plaintiffs' claims regarding the statutory time limits. Given the lateness of the date on which plaintiffs filed their complaint, these defenses are not wholly unpersuasive, but since the court finds that plaintiffs have failed to meet their burden of proof on the constitutional issues, no ruling as to laches, estoppel, or waiver is necessary. Moreover, defendants did not press these defenses at the final hearing.

Additionally, looking at the requirements of §99.0955 as a "totality," *Stover v. Brown, supra,* at 737, it is obvious that plaintiffs bear a heavy burden indeed in attempting to prove the 160-day time limit constitutionally suspect. Like the Georgia petition process involved in *Jenness v. Fortson, supra,*

> [Florida] imposes no suffocating restrictions whatever upon the free circulation of nominating petitions. A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who has not even registered at the time of the previous election. No signature on a nominating petition need be notarized.
>
> In a word, [Florida] in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.

Id. at 438-99. Plaintiffs have failed to carry their ample burden on the issue whether §99.0955 is unduly restrictive in its provision of time for obtaining signatures, and, in the absence of evidence to the contrary, this portion of the statute must be regarded as valid.

Fourth, plaintiffs characterize as unreasonably burdensome the statutory requirement that petitions must be submitted before noon of June 12, 1978 (the ninety-second day preceding the first primary election). This date falls 148 days prior to the November 7, 1978, general election. In plaintiffs' view, the date chosen is wholly arbitrary

and forces an independent candidate to make the decision to become a candidate at an unreasonably early date.

Some cases have held unconstitutional petition filing dates which are so remote from the date of the election that the candidate must seek signatures in a virtual political vacuum, with low voter interest and no firmly defined issues or opposition candidates. *See Salera v. Tucker,* 399 F. Supp. 1258 (E. D. Pa. 1975), *aff'd,* 424 U.S. 959 (1976); *Mandel v. Bradley,* 432 U.S. 173 (1977), *on remand,* Civil Action No. T-76-638 (D. Md., May 4, 1978). These cases, however, involved filing dates so far in advance of the date of election as to be of little assistance to adjudication of plaintiffs' claim. In *Mandel* the statutory filing date fell 230-240 days before the general election; in *Salera* the papers were required to be filed 218 days (or 244 days in a presidential year) before the election. Under the facts as presented in those cases, it was not surprising for the federal courts to find that the early filing date substantially burdened an independent's access to the ballot without significantly advancing any countervailing state interests.

The situation here is radically different from that in *Salera v. Tucker* and *Mandel v. Bradley.* It resembles far more the factual circumstances of *Ashworth v. Fortson,* 424 F. Supp. 1178 (N.D. Ga. 1976), where a three-judge district court approved a petition filing date which came approximately 150 days before the general election and 60 days before the party primaries. The Georgia statute upheld in *Ashworth* required filing by the second Wednesday in June, a date which this year falls only two days after the June 12, 1978 filing date required by Florida Statutes §99.0955.

The elements relied upon by the *Ashworth* court in holding the Georgia Statute constitutional apply with equal emphasis to §99.0955. The court noted that,

> During this two-month period between the June filing date and the August primaries, the State must process the petitions for independent and political body candidates and party primary candidates filing nominating petitions in lieu of paying the filing fee. Each signature must be verified and sufficient time set aside for resolving contested petitions. The State has demonstrated that this time frame is reasonably required to process petitions.

424 F. Supp. at 1182. The evidence in the case at bar establishes that the hiatus between the June 12 filing date and the primary and general elections constitutes the time of heaviest business for elections officials in this state. In addition to verifying petitions, other duties, such as registering new voters and preparing poll workers and polling places, must be accomplished. The verification of petition signatures must be completed and certification of the petitions submitted to the Division of Elections by July 25, 1978. This proof demonstrates that the State of Florida has not acted unreasonably in setting the filing deadline on June 12, 1978.

The decision in *Ashworth* further rested upon consideration of "the generally liberal quality of the Georgia election system as a whole," which was determined to outweigh "any potential hardship on independent . . . candidates." 424 F. Supp. at 1182. As discussed previously in this opinion, Florida's petition process partakes of the same openness and lack of impediments to distribution of petitions that characterized the Georgia system discussed in *Ashworth* and *Jenness v. Fortson*, *supra*.

Moreover, plaintiffs have failed to prove that the §99.0955 petition process subjects them to the same difficulties as were present in *Salera v. Tucker* and *Mandel v. Bradley, supra.* In those cases the filing date was sufficiently remote from the election that the voters and the news media were generally disinterested in the independent candidate's campaign. No issues had yet been developed, and the candidates were still unaware of the identities of their probable general election opponents. The difficulties in organizing, fund raising, and soliciting petitions were exacerbated by adverse winter weather conditions. In contrast to these problems that arose as a consequence of the earlier filing dates involved in *Salera v. Mandel,* plaintiffs here have been unable to demonstrate any hardship resulting from Florida's imposition of the June 12 filing date. This deficiency in the proof precludes this court from finding in plaintiffs' favor.

Plaintiffs' fifth contention with regard to §99.0955 is that it unreasonably requires an independent candidate to pay all the costs connected with obtaining signatures, including the cost of verifying the signatures (10¢ for each signature checked, or the actual cost of checking signatures, whichever is less). This claim is easily turned aside. As an initial matter, it must be noted that it simply overstates the financial burden resting on an independent candidate. The State of Florida provides the petition cards to the candidate's campaign committee at no charge (plaintiff Kirk's campaign has been furnished with 216,000 signature cards). In addition, §99.097(4) makes provision for "a candidate who is unable to pay [verification] charges without imposing an undue burden on his personal resources or upon the resources otherwise available to him" by allowing the candidate to certify under oath that he cannot pay.

thereby entitling him to verification of his petitions without cost.

Plaintiffs complain of the "tremendous monetary expenditure" involved in organizing and carrying to fruition an independent candidate's petition drive. Plaintiffs' memorandum at 33. They view the costly petition requirement as unfarily penalizing a candidate's choice to run as an independent. This argument wholly ignores the tremendous organizational and financial burdens incumbent upon a candidate who decides to take the party primary route to the ballot. It is almost fanciful to conclude that the petition requirement places any more of a hardship upon the independent candidate than campaigning for a primary election does on a major party candidate. The Supreme Court has previously addressed and rejected a claim closely akin to the one plaintiffs have raised:

> The appellants claim under the Equal Protection Clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. That is a premise that cannot be uncritically accepted. Although the number of candidates in a party primary election for any particular office will, of course, vary from election to election, the appellee's brief advises us that in the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries. Only two of these 12, of course, won their party primaries and had their names printed on the ballot at the general election. Surely an argument could as well be made on behalf of the 10 who lost, that it is *they* who were denied equal protection vis-a-vis a candidate

> who could have had his name printed on the ballot simply by filing a nominating petition signed by 5% of the total electorate.

Jenness v. Fortson, 403 U.S. at 440.

The State of Florida has legitimate interests in insuring that an independent is a serious candidate and possesses genuine support in the community. The petition procedure, costly though it may be, intrudes no farther upon the candidate's right to a place on the ballot than is necessary to achieve these valid ends. In this modern era, an efficient and successful campaign must be fueled by the efforts of large numbers of unpaid volunteers or the infusion of large amounts of campaign contributions, or both. Whether a candidate runs as an independent or the representative of a party, or attains ballot position by way of a primary or a petition drive, the costs are merely a necessary incident to his campaign. The ability to draw contributions and vodunteers is a measure of the candidate's support in the community. The State of Florida has not overstepped constitutional bounds by requiring candidates to demonstrate the necessary support by the methods enacted in §99.0955.

Plaintiffs' final broadside at the statute asserts that the provisions made for an independent's access to the ballot are unreasonable because no alternative avenues toward ballot placement are established. Plaintiffs hold the view that a former Governor, whose continuing support among an element of the electorate is proven by public opinion polls, and whose name recognition within the state is unquestioned, should not have to submit himself to the §99.0955 petition process, but should be automatically admitted to the ballot by way of a procedure similar to that set up in Florida Statutes §103.101(2)(a) for major party presidential candidates.

This claim is untenable. First, it states a *non sequitur,* for the candidate with the greatest recognition and voter popularity is the one who will have the easiest time meeting the petition requirements, and he will have little cause to complain of its burden.

Second, Florida has created a reasonable method of ballot access for independent candidates. The State need not take upon itself the task of determining who is or is not a serious candidate, but may place on the political aspirants themselves the burden of proving that they are entitled to a place on the ballot by any reasonable means chosen for the purpose. If Florida granted a special exemption for well-known candidates like plaintiff Kirk, all other candidates would undoubtedly feel, with some justification, that they have been unfairly discriminated against.

To conclude, plaintiffs have failed to establish the unconstitutionality of Florida Statutes §99.0955 on any of the asserted bases. The statute may not be perfect or unsusceptible to beneficial change; however, any demand for such change must now be directed to the elected representatives of the people of the State of Florida. As far as the court can determine from the record of this case, Florida Statutes §99.0955 "affords [independent candidates] a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more." *American Party of Texas v. White, supra,* at 788.

ORDER

In accordance with the foregoing memorandum opinion, it is hereby

ORDERED AND ADJUDGED:

1. The motion to intervene of the Republican Party of Florida is granted, and the Republican Party of Florida shall be allowed permissive intervention in this lawsuit as a party defendant. Rule 24(b)(2), F.R.Civ.P.

2. Plaintiffs' motion for preliminary injunction is denied.

3. This case having proceeded to a final hearing, and plaintiffs having failed to demonstrate the invalidity of Florida Statutes §99.0955, this action is dismissed on the merits, and the clerk of the court is directed to prepare and enter judgment in favor of defendants Bruce A. Smathers and Mary Singleton and intervenor/defendant Republican Party of Florida, and against the plaintiffs Claude R. Kirk, Jr., F. J. Roberto, Jr., and Stephen R. MacNamara.

DONE AND ORDERED this 8th day of June, 1978.

/s/ William Stafford
William Stafford
United States District Judge

FLORIDA STATUTES

99.0955 Independent candidate for office; name on general election ballot.—

(1) Any registered elector seeking to have his name placed on the ballot at the general election as an independent candidate for an office may have his name printed on the general election ballot in which election such office is to be filled, provided he is otherwise qualified to hold the office that he seeks and provided a petition requesting that he be assigned a position on the general election ballot is signed by the required number of registered electors. Such person shall obtain the signatures on a petition form prescribed by the Department of State and furnished by the appropriate qualifying officer. Such forms may be obtained from the qualifying officer at any time after the first Tuesday following the first Monday in January preceding the general election, but prior to the 49th day prior to the date of the first primary election.

(2) A candidate for an office elected on a statewide basis shall obtain the signatures of a number of the qualified electors equal to 3 percent of the registered electors of Florida, as shown by the compilation by the Department of State for the last preceding general election. When joint candidacies for the offices of Governor and Lieutenant Governor are provided by law, independent candidates for the offices of Governor and Lieutenant Governor shall form a joint candidacy, and only one petition shall be used to place both names on the ballot as otherwise provided in this section. A candidate for any federal, state, county, or district office to be elected on less than a statewide basis shall obtain the signatures of a number of the qualified electors of the district, county, or other geographical entity equal to at least 3 percent of the total

number of the registered voters of the district, county, or other geographical entity represented by the office sought, as shown by the compilation by the Department of State for the last preceding general election.

(3)(a) Each candidate for a federal, state, or multicounty district office shall submit a separate petition for each county from which signatures are sought. Each petition shall be submitted, prior to noon of the 49th day preceding the first primary election, to the supervisor of elections of the county for which such petition was circulated. Each supervisor to whom a petition is submitted shall check the names and shall, upon payment of the cost of checking the petitions or filing of the oath as prescribed in s. 99.097, certify to the Department of State, within 30 days of the last day for qualifying, the number shown as registered electors of said county. The Department of State shall determine whether or not the required number of signatures has been obtained and shall notify the candidate. If the required number of signatures has been obtained and the candidate has, during the time prescribed for qualifying for office, filed his qualifying papers with the Department of State, paid his filing fee, and taken the oath provided in s. 99.021, such candidate shall be entitled to have his name printed on the general election ballot. However, any candidate who is unable to pay such fee without imposing an undue burden on his personal resources or upon resources otherwise available to him shall, upon written certification of such inability given under oath to the Department of State, be exempt from paying the filing fees. The name of each candidate who is entitled pursuant to this paragraph to have his name printed on the general election ballot shall be certified to the supervisor of elections of each county affected by such candidacy by the Department of State at the time the

names of other candidates to be printed on the general election ballot are certified to each supervisor.

(b) Each candidate for a county office, or district office not covered by paragraph (a), shall submit his petition, prior to noon of the 49th day preceding the first primary election, to the supervisor of elections of the county for which such petition was circulated. The supervisor shall determine whether the required number of signatures has been obtained and shall, within 30 days of the last day for qualifying, notify the candidate. If the required number of signatures has been obtained for the name of the candidate to be placed on the ballot and the candidate has, during the time prescribed for qualifying for office, filed his qualification papers with the supervisor of elections, paid his filing fee, and taken the oath prescribed in s. 99.021, such candidate shall be entitled to have his name printed on the general election ballot. However, any candidate who is unable to pay such fee without imposing an undue burden on his personal resources or upon resources otherwise available to him shall, upon written certification of such inability given under oath to the supervisor, be exempt from paying the filing fee. Upon paying the cost of checking the petitions or filing the oath required by s. 99.097, such candidate shall be entitled to have his name placed on the general election ballot.

103.021 Nomination for presidential electors.— Candidates for presidential electors shall be nominated in the following manner:

(1) The Governor shall nominate the presidential electors of each political party. He shall nominate only the electors recommended by the state executive committee of the respective political party. Each such elector shall be a qualified elector of the party he represents who has taken an oath that he will vote for the candidates of the party that

he is nominated to represent. The Governor shall certify to the Department of State on or before September 1, in each presidential election year, the names of a number of electors for each political party equal to the number of senators and representatives which this state has in Congress.

(2) The names of the presidential electors shall not be printed on the general election ballot, but the names of the actual candidates for President and Vice President for whom the presidential electors will vote if elected shall be printed on the ballot in the order in which the party of which the candidate is a nominee polled the highest number of votes for Governor in the last general election.

(3) A minor political party may have the names of its candidates for President and Vice President printed, and independent candidates for President and Vice President may have their name printed, on the general election ballots if a petition is signed by one percent of the registered electors of Florida, as shown by the compilation by the Department of State for the last preceding general election. A separate petition shall be submitted from each county for which signatures are solicited. Said petition shall be submitted to the supervisor of elections of the respective county no later than August 15 of each presidential election year. The supervisor shall check the names and shall, on or before the date of the first primary, certify the number shown as registered electors of said county, and said supervisor shall be paid by the person requesting the certification the cost of checking the petitions prescribed in s. 99.097. The supervisor shall then forward the certificate to the Department of State which shall determine whether or not the percentage factor as required in this section has been met. When the percentage factor as required in this section has been met, the Department of State shall order the names of the candidates for whom the petition was

circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

(4) Any minor political party which has met the petitioning requirements of s. 99.096 and will have the names of a candidate or candidates for any office or offices to be filled by a statewide election printed on the general election ballot, and which minor party is affiliated with a national party holding a national convention to nominate candidates for President and Vice President of the United States, may have the names of its candidates for President and Vice President of the United States printed on the general election ballot by filing with the Department of State a certificate naming the candidates for President and Vice President and listing the required number of persons to serve as electors. Notification to the Department of State under this subsection shall be made by September 1 of the year in which the election is held. When the Department of State has been so notified, it shall order the names of the candidates for whom the petition was circulated to be included on the ballot and shall permit the required number of persons to be certified as electors in the same manner as other party candidates.

(5) When for any reason a person nominated or elected as a presidential elector is unable to serve because of death, incapacity, or otherwise, the Governor may appoint a person to fill such vacancy who possesses the qualifications required for him to have been nominated in the first instance. Such person shall file with the Governor an oath that he will support the same candidates for President and Vice President that the person who is unable to serve was committed to support.

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-457

LORI WILSON,

Petitioner,

-vs-

GEORGE FIRESTONE, Secretary of State, and DOROTHY W. GLISSON, Deputy Secretary for Elections, Director, Division of Elections of the State of Florida,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE FLORIDA PROCEDURE FOR INDEPENDENT CANDIDATES FOR THE UNITED STATES SENATE TO OBTAIN ACCESS TO THE BALLOT VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 623 F.2d 345 (5th Cir. 1980). The opinion of the district court is set forth in the

Appendix to the Petition (A 4-8).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition filed herein.

STATUTES INVOLVED

Florida Statutes, Section 99.0955 (1979)

Florida Statutes, Section 103.021 (1979)

(The above statutes are set forth in the Appendix to the Petition, A-33-37).

STATEMENT OF THE CASE

This is an action brought by the Petitioner, an announced independent candidate for the office of United

States Senator, seeking an order declaring the Florida access to the ballot provisions unconstitutional, and enjoining the enforcement thereof. The district court rejected Petitioner's contentions, and the Court of Appeals for the Fifth Circuit affirmed.

SUMMARY OF ARGUMENT

I

The equal protection clause is implicated only where persons who are similarly situated are not treated uniformly. Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964). This Court in Illinois State Board of Elections v. Socialist Workers Party, 404 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979), in adhering to this principle, did not preclude a state from considering the nature of different offices when providing for access to the ballot. In the case at bar, the courts below found a logical reason for classifying an independent candidate for President of the United States differently than an independent candidate for a statewide office in view of the

nature of the offices and the candidacy involved. Petitioner has not been discriminated against nor denied equal protection by this logical classification.

II.

The standards applicable to state statutes governing access to ballots have been addressed by this Court. The lower court decisions rendered in this matter are consistent with such standards and thus the issuance of a Writ by this Court is not indicated.

ARGUMENT

I

THE LOWER COURTS PROPERLY APPLIED THE PRINCIPLES OF ILLINOIS STATE BOARD OF ELECTIONS V. SOCIALIST WORKERS PARTY, 440 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979), IN UPHOLDING FLORIDA'S ACCESS TO THE BALLOT PROVISIONS.

The Petitioner's challenge in this case is primarily focused on the contention that this Court's decision in Illinois State Board of Elections v. Socialist Workers Party, 404 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983 (1979), prohibits the State of Florida from providing different requirements for an independent candidate for the United States Senate than for an independent presidential or vice-presidential candidate to obtain access to the

ballot. This Court summarily approved the Florida access-to-ballot provisions in Beller v. Askew, 403 U.S. 925, 91 S.Ct. 2248, 29 L.Ed.2d 705 (1971), and indeed, as noted by the lower court herein, this Court has approved more stringent requirements than the Florida provisions in Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

Petitioner contends, however, that the decision of Illinois State Board of Elections v. Socialist Workers Party, supra, requires a different result in this case. This Court in Illinois State Board did not specifically hold that a state may not consider the nature of different offices when providing for independent candidate access to the ballot, and indeed the concurring

opinion of Justice Blackmun points out the danger in a simplistic across-the-board approach to such procedures.

The district court here had previously considered precisely the same challenge in Kirk v. Smathers, Case No. TCA 78-0815 (N.D. Fla., decided June 8, 1978), which is set forth in Petitioner's Appendix A-9-A-33. In a thorough analysis, the district court upheld the Florida procedures:

> Plaintiffs' assertion that it is invidious discrimination to place conditions upon independent candidates for the Presidency and Vice-Presidency which are different from, and unequal to, those imposed upon independent candidates for all other elective offices is fatally flawed. The

argument suffers because it attempts to equate the situations of candidates for all elective offices and assumes that the same considerations must apply to all despite obvious differences in the burden each must face in attempting to gain election. It is a familiar concept that the Equal Protection Clause is implicated only where "persons standing in the same relation to the governmental action questioned or challenged" are not treated uniformly. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

Florida has chosen to afford to independent and minor party candidates for President and Vice-President (the only nation-wide elective offices) a less onerous pathway to ballot position. This is not an arbitrary choice. As suggested by the testimony of Elections Director Singleton, the differing qualifications reflect a realization by the State of Florida of the unique problems posed by candidacy for nation-wide office.

Candidates for the Presidency and Vice-Presidency must campaign in many, if not all, of the states of the Union. It appears to have been the judgment of the Florida Legislature that the burden on such candidates in trying to become placed on the ballot in this and other states may be insurmountable if they are required to expend the time, resources, and campaign funds in this single state necessary to obtain the signatures of 3% of the voters. Independent candidates for all other offices are free of the difficulties attendant upon far-flung presidential campaigns, and may concentrate their efforts in order to satisfy the 3% requirement.

Mr. Justice Stewart's comments for the Supreme Court in Jenness v. Fortson, 403 U.S. 431, 441-42 (1971), are particularly appropriate in the present context:

> The fact is that there are obvious differences in kind

> between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes, supra.

The case at bar does not involve an instance where the State of Florida has imposed different requirements upon persons who are similarly situated. The requirement of gathering petition signatures of 3 percent of the voters applies equally to other candidates seeking the same office as plaintiff Kirk, including

> major party candidates who cannot pay the filing fee, Florida Statutes §99.095, and minor party candidates, Florida Statutes §99.096. There are significant dissimilarities between the campaign problems faced by national, as opposed to state-wide or local candidates. It does not offend Fourteenth Amendment guarantees for Florida to take these differences into account when fashioning rules to govern the placing of independent candidates' name on the ballot.

Id., A-18 through A-20.

Both the district court and the Court of Appeals found that the Florida provisions are not analogous to the Illinois procedure struck down in Illinois State Board of Elections v. Socialist Workers Party, supra. The decisions here properly apply the principles set forth by this Court.

and accordingly the Petition for Writ of Certiorari filed herein should be denied.

II.

THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

Rule 19 of the Supreme Court Rules provides in part that a writ of certiorari ". . . will be granted only where there are special or important reasons therefor." Rule 19(b) of the Supreme Court Rules then sets forth an indication of the reasons considered in the disposition of a petition for writ of certioari:

> Where a court of appeals has . . . decided an important question of federal law which has not been, but should

> be settled by this Court, or has decided a federal question in a way in confli with applicable decisions of this Court. . .

As indicated above, this Court has previously considered the appropriate standards governing state access to ballot provisions. The decision of the lower court herein properly follows the standards set out by this Court and Petitioner has demonstrated no special or important reason for issuance of a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondents George Firestone, Secretary of State of the State of Florida, and Dorothy W. Glisson, Deputy Secretary for Elections of the State of Florida, submit that the questions upon which this cause depends are insufficient to support the issuance of a Writ of Certiorari. Respondents accordingly move this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals Fifth Circuit has been furnished to Petitioner's Counsel, the Honorable Barry Richard, ROBERTS, MILLER, BAGGETT, LaFACE, RICHARD & WISER, Post Office Drawer 1838, Tallahassee, Florida 32302, by U.S. Mail, this _____day of October, 1980.

RICHARD A. HIXSON
Assistant Attorney General